Bell Atlantic Network Services, Inc. Carrier Services
Two Bell Atlantic Plaza
1320 North Court House Road
Ninth Floor
Arlington, Virginia 22201

September 30, 1997

Mr. Scott Hoyt
Arch Communications Inc.
1800 W. Park Drive
Westborough, MA. 01581

To All Paging Carriers:

RE: One-Way Type 2 Paging Interconnection

Effective with the lifting of the Federal Court Stay on November 1, 1996, Bell Atlantic stopped billing usage charges associated with one-way Type 2 paging trunks. However, due to billing system limitations, the non-usage sensitive entrance facility charge continued to appear on the bills in states that had Local Transport Restructure (LTR).

This letter is to advise you that Bell Atlantic plans to cease billing recurring charges for entrance facilities for one-way Type 2 paging trunks and credit the relevant charges retroactive to November 1, 1996. This process will begin once the billing system modifications are completed in December of this year.

Type 2 entrance facilities are also used for non-local traffic, (i.e., interMTA calls) and to provide paging carriers a gateway to receive calls to their customers from other networks which transits Bell Atlantic's network.

Because there is a mixture of traffic types on these dedicated entrance facilities, Bell Atlantic plans to bill a percentage of the entrance facility charge. Based on our analysis of available traffic studies, Bell Atlantic has determined that 80% of the traffic delivered to paging carriers over dedicated interconnection entrance facilities is local telecommunications traffic (intraMTA traffic) and 20% is either interMTA traffic or traffic that does not originate on Bell Atlantic's network (e.g., transit traffic originated by third parties, such as IXCs, LECs other than Bell Atlantic, CLECs and other CMRS providers).[23]

Effective October 1, 1997, Bell Atlantic will begin to bill paging providers 20% of the non-usage sensitive dedicated entrance facility charges as set forth in Bell Atlantic's access tariffs. This billing will be applied on a prospective basis only. It will not be applied retroactively to November 1, 1996.

If you have any questions concerning these changes please submit them to me in writing at:
1320 North Courthouse Road
9th Floor
Arlington, VA 22201

Sincerely,

Calvin Twyman
Wireless Contract Manager

[23] 47 C.F.R. § 51.703 provides that "[a] LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network." By implication, LECs may charge for traffic that is not local or does not originate on its network.

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Decision 97-05-095 May 21, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Cook Telecom, Inc., for arbitration pursuant to Section 252 of the Federal Telecommunications Act of 1996 to establish an interconnection agreement with Pacific Bell.	Application 97-02-003 (Filed February 3, 1997)

David M. Wilson and David A. Simpson, Attorneys at Law, for Cook Telecom, Inc., applicant.
Thomas J. Ballo and David Discher, Attorneys at Law, for Pacific Bell, respondent.
Karen Jones, Marc Kolb and Mike Watson, for the Commission's Telecommunications Division.

INTERIM OPINION

1. Summary

We reject the Arbitrated Interconnection Agreement between Cook Telecom, Inc. (Cook or applicant) and Pacific Bell (Pacific or respondent) because it fails to provide for compensation to Cook for the costs that Cook incurs in terminating calls to its paging customers. Accordingly, the agreement fails to comply with Sections 251(b)(5) and 252(d)(2)(A)(i) of the Telecommunications Act of 1996 (Act) and our Rules Governing Filings Made Pursuant to the Telecommunications Act of 1996, Resolution ALJ-168 (Rules). We further order the parties to file an agreement in conformance with this decision.

2. Background

On February 3, 1997, Cook filed a timely application for arbitration of terms, conditions and rates for interconnection with Pacific. Pacific filed a timely response on February 28, 1997.

Arbitration hearings were held on March 12 and 13, 1997. Opening briefs were filed and served on March 24, 1997, and reply briefs were filed and served on March 31, 1997.

An Arbitrator's Report was filed and served on April 21, 1997. On April 28, 1997, parties filed and served a conformed agreement in compliance with the Arbitrator's Report. On May 2, 1997, parties filed and served comments on the Arbitrator's Report and the conformed agreement.

3. Arbitrated Agreement

The threshold issue is whether applicant is entitled to transport and termination compensation. We conclude, contrary to the Arbitrator's Report, that applicant is so entitled pursuant to the Act.

Under Rule 4.2.4, we may reject an arbitrated agreement or portions thereof that do not meet the requirements of Section 251 of the Act, regulations prescribed under Section 251 by the Federal Communications Commission (FCC), or the pricing standards set forth in Section 252(d) of the Act. Pursuant to Section 252(e)(3) of the Act, we may also reject agreements or portions thereof which violate other requirements of the Commission. For the reasons set forth below, we reject the arbitrated agreement filed by the parties and order the parties to file an agreement in compliance with this decision.

3.1 Act and FCC Regulations

Respondent has a duty under Section 251 "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." (Section 251(b)(5).) Section 252(d) further provides that a State Commission shall not consider terms and conditions for reciprocal compensation just and reasonable unless the "terms and conditions provide for the mutual and reciprocal recovery" of costs "by each carrier." (Section 252(d)(2)(A)(i).)

Applicant is a one-way paging company. Applicant does not originate traffic for termination on respondent's network. Respondent argues that because traffic flows only one-way -- i.e., respondent always terminates traffic on the applicant's network -- and respondent never terminates traffic on its network from the applicant, applicant is not entitled to compensation because such compensation is not "mutual" or "reciprocal" within the meaning of Section 251(b)(5) of the Act.

We disagree. Under Section 251(a) of the Act, respondent has a duty to interconnect with applicant who otherwise qualifies as a "telecommunications carrier" providing "telecommunications service" within the meaning of the Act. (47 U.S.C.§§3(44) & (46)). In fulfilling this duty, respondent has an obligation under Section 251(b)(5) "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." Under Section 252(d)(2) the state is to ensure that "terms and conditions for reciprocal compensation" "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." (emph. added).

In creating these duties, Congress did not carve out an exception with respect to those telecommunications carriers providing a telecommunications service that consisted of one-way paging. To the contrary, Congress broadly required local exchange carriers to interconnect with all providers of communication services meeting the definitional sections of the Act, and to compensate each carrier on reasonable terms and conditions for the costs that it incurs in terminating calls to the called party that originate on the local exchange carrier's network.

Respondent does not dispute that there are costs incurred by applicant in terminating calls to applicant's customers. We do not think that Congress intended a result that, on the one hand, would require respondent to compensate a carrier providing two-way wireless service for the costs that the carrier incurs, but on the other hand, allow respondent to deny compensation to a carrier providing one-way wireless service for the costs that such carrier incurs. To be sure, when respondent terminates calls on its network from cellular and other wireless providers, respondent is compensated for the costs that it incurs in terminating such traffic. We believe that Congress intended that each and every carrier should be compensated for the costs that it incurs in terminating traffic, and did not intend to deny a class of carriers -- in this case, one-way paging -- the right of compensation simply because there is no traffic terminated on the local exchange carrier's network. We fail to discern any public policy that Congress intended to further by denying such compensation to one-way paging carriers when, at the same time, Congress went to such great lengths to grant such carriers the right to interconnect and compete on an equal footing under the Act. We believe that Congress simply recognized that historically, while local exchange carriers have been compensated by competitors for terminating competitors' traffic, the local exchange carrier should reciprocate by compensating competitors for terminating the local exchange carrier's traffic.

Our construction of the Act is consistent with that adopted by the Federal Communications Commission ("FCC"). In Local Competition Provisions of the 1996 Telecommunications Act, First Report and Order, 11 FCC Rcd 15499 (Aug.1, 1996), the FCC promulgated regulations pursuant to the Act that required all LECs [local exchange carriers] to enter into reciprocal compensation arrangements with all CMRS [commercial mobile radio service] providers, including paging providers, for the transport and termination of traffic." Id. at para. 1008. The FCC was careful to expressly specify, and clarify any perceived ambiguity, that paging providers are included in the class of CMRS providers entitled to compensation for terminating traffic. See also id. at para. 1092 ("... paging providers, as telecommunications carriers, are entitled to mutual compensation for the transport and termination of local traffic...") and para. 1093 ("we direct states, when arbitrating disputes under Section 252(d)(2), to establish rates for the termination of traffic by paging providers based on forward-looking economic costs of such termination to the paging provider.") The FCC's policies are consistent with our interpretation of the Act that Congress intended to compensate all carriers, including one-way paging carriers, for terminating traffic.

3.2 Termination and Transport

Respondent next claims that applicant does not transport and terminate traffic, and hence does not qualify for compensation under the Act. We disagree. As discussed above, paging carriers qualify as telecommunication carriers providing telecommunications services within the meaning of the Act. When a caller dials a paging customer, the call is initially transported on the local exchange carrier's network, and then handed off to the paging carrier for ultimate delivery to the called party. As explained by applicant, dedicated trunks pick up land-to-pager calls at [respondent's] tandem offices. These facilites then carry such calls to Cook's terminals. Exhibit 1 (Cook Testimony). In this arbitration, both parties agreed that similar dedicated trunks are used to connect respondent's end-offices to applicant's paging terminals. We agree with applicant that it provides termination and hence applicant should be compensated regardless of whether the interconnection occurs at an end-office or tandem. However, as discussed below, we disagree with applicant that it is entitled to receive compensation for any costs incurred beyond the paging terminal. Cook is only entitled to compensation for its paging-terminal costs, which, for the purposes of this arbitration, we will consider an "equivalent facility" to an end office switch.[1]

From the evidence in this case, Cook provides no transport because Pacific Bell provides the interoffice trunking facilities between its end office and/or tandem and Cook's paging terminal. Therefore, Cook is not entitled to compensation for transport between respondent's end-office or tandem and applicant's paging terminal.[2] Although Cook is not entitled to compensation for transport, neither will it be charged. We note that pursuant to a stipulation discussed below, Pacific will not charge for the facilities it uses to transport calls to Cook because Cook is awarded termination charges in this order.

3.3 <u>Discrimination</u>

Section 251(c)(2) requires nondiscriminatory interconnection for transmission and routing of telephone exchange service and exchange access. Applicant does not provide telephone exchange service or exchange access. Therefore, the nondiscrimination provision of this subsection does not control.

Section 252(i) further requires that respondent:

> "...shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."

Applicant asserts this obligates respondent to offer applicant the same rates paid to Pac-West Telecom, Inc. (Pac-West),

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1 D.92-01-016, 43 CPUC2d 3, 15 (1992); <u>cf</u>. 47 C.F.R. § 51.701(d).

2 However, to the extent Cook owns facilities that connect from respondent's end-offices or tandems to Cook's paging terminals, applicant is entitled to compensation for transport.

as incorporated in the agreement advocated by applicant. We affirm the Arbitrator's findings that this is incorrect. The Pac-West agreement was not approved under the Act. Moreover, applicant is not a competitive local carrier as is Pac-West, and applicant's service is not the same as Pac-West's service. Also, there is no evidence on the record of this proceeding for us to determine whether the rates adopted in the Pac-West agareement are based on cost.

3.4 Public Policy

Congress provided under the Act that local exchange carriers interconnect with, and pay compensation for, the termination of traffic, to all telecommunications carriers that provide telecommunications services. In this case, applicant incurs costs for terminating traffic that originates on the respondent's network. No public policy is served by denying applicant the right to be compensated by the respondent (with which applicant interconnects) on just and reasonable terms for the costs that applicant incurs in transporting and terminating traffic.

3.5. Compensation Rates

Pursuant to Section 252(d)(2)(A), terms and conditions for reciprocal compensation of transport and termination must be based on a reasonable approximation of the additional costs of termination. Having reviewed the cost information submitted on the record, we do not feel confident in establishing final rates at this time. However, we are prepared to establish interim rates.

Cook's witness, Trout, introduced a cost study which purportedly arrived at a forward-looking cost of 2.4 cents per page. Trout's study assumed a network designed to serve 50,000 customers that would each generate 70 pages per month. His study included the costs for the paging terminal, for the paging transmitters, and for the facilities linking them together. Cook requests the termination rate that Pacific pays to Pac-West Telecom under an agreement submitted to the Telecommunications Division in Advice Letter 18115, that would result in 0.95 cents compensation per page (less than Trout's cost estimate).

Pacific's witness Scholl testified that Trout's cost study was flawed and that after making adjustments, a more appropriate estimate would be from 0.006 to 0.088 cents per page depending on the type of paging terminal used and on the capacity assumptions for that paging terminal. Scholl argues that Trout's study did not conform to the consensus costing principles established in D.95-12-016. Scholl's adjustments exclude costs associated with paging transmitters and with the facilities that link the transmitters with the paging terminal. Scholl argues that these portions of the paging network are not traffic-sensitive and therefore should not be included in the TSLRIC of termination just as local loop facilities are not included the TSLRIC of termination in the wireline context. Also, Scholl attempts to eliminate costs that are not directly associated with paging service, such as voice features. Additionally, Scholl argues that Pacific should not have to compensate Cook for traffic sent over Type 1 (end-office) interconnections because Pacific avoids no costs by sending traffic that way.

We share Pacific's concerns that Cook has not submitted an acceptable cost study which is consistent with our adopted consensus costing principles adopted in D.95-12-016. Pacific's argument to limit the cost study to paging-specific features, to traffic originated by Pacific, and to traffic-sensitive elements is compelling. We are also concerned that Cook's study used a terminal which had excess capacity. Cook's cost study does not convince us to adopt the termination rates negotiated by Pacific Bell and Pac-West Telecom nor those rates established in arbitrations between Pacific and wireline CLCs as reasonable approximations of Cook's additional costs of termination. Furthermore, although we are not bound by the FCC's determination on this issue, we note that First Report and Order presumes that a paging company's additional costs of termination would be less than those of the incumbent LEC, warns against the economic harm of imposing a rate based on the LEC's costs for termination, and specifically directs state commissions not to use the termination proxies established in the Order for establishing a paging carrier's termination rates (paragraphs 1092, 1093).

Pacific's adjustments to Cook's cost study appear to be reasonable, based on the record in this proceeding. Therefore, on an interim basis, we will accept Pacific's adjusted cost figure, 0.088 cents per page, based on an appropriately sized paging terminal, to set the termination rate. Pacific will pay the same rate to Cook regardless of whether the traffic is sent over a Type 2A (tandem) or a Type 1 connection.

We emphasize that these rates are interim. Therefore, we will keep this proceeding open to take further evidence to set a forward looking compensation rate which is consistent with our consensus costing principles. The assigned arbitrator will issue an ALJ ruling to set out a schedule for the second phase of the proceeding.

3.6 Rejection of Arbitrated Agreement and Filing of Agreement Consistent with the Terms of This Decision

For the reasons discussed, the arbitrated agreement does not meet the requirements of Sections 251(b)(5) and 252(d)(2). We therefore reject the agreement, and direct the parties to submit a new agreement that provides compensation to the applicant for its transport and termination of calls.

At the direction of the arbitrator, both parties previously presented a "dueling clause" agreement with sections that would be included or deleted as a consequence of the outcomes of the Arbitrator's Report (Ex. 20). We direct the parties to use that "dueling clause" agreement to file a new agreement that complies with the findings in this decision. In the dueling clause agreement, compensation for use of local paging interconnection facilities (Section 3.2 of the agreement) depended upon the basis for our finding. To clarify our position, we find that Cook is not entitled to reciprocal compensation pursuant to the terms of the Pac-West agreement. Therefore, the alternate language for Section 3.2 which determines that Cook is entitled to reciprocal compensation on terms other than those in the Pac-West agreement, should be adopted. The resulting section 3.2 provides for the recurring facilities charges to be apportioned between the parties based on the each party's relative amount of originating traffic sent over those facilities. Consequently, Cook will not be assessed recurring charges for the facilities.

Findings of Fact

1. Applicant is a one-way paging company.

2. Applicant terminates traffic that originates on the respondent's network and provides termination of telecommunications.

3. Applicant incurs costs for terminating traffic that originates on the respondent's network.

4. The Pac-West agreement was not approved under the Act.

5. Applicant does not provide the same service as PacWest.

6. No public policy objectives are met by denying compensation to applicant for the cost of terminating calls that originate on respondent's network.

7. Cook submitted a cost study that estimates the termination cost as 2.4 cents per page.

8. Cook requests the termination rates negotiated between Pacific Bell and Pac-West Telecom in Advice Letter 18115. Under those terms, Cook would be compensated at aproximately 0.95 cents per page.

9. We have no evidence in this case that the rates adopted in the Pac-West agreement with Pacific are based on cost.

10. Cook's cost study does not comply with our consensus costing principles established in D.95-12-016.

11. Cook's cost study includes costs for the paging terminal, the paging transmitters, and the facilities that connect them.

12. Cook's cost study includes costs for features that can be used for non-paging service.

13. Cook's cost study includes costs for equipment that can be used for other purposes than terminating Pacific-originated traffic.

14. Based on the record in this proceeding, Pacific's adjustments to Cook's cost study are reasonable to set rates on an interim basis.

15. Pacific makes adjustments to Cook's cost study to arrive at a cost ranging from 0.006 to 0.088 cents per page depending on the paging terminal selected and the capacity assumptions employed.

Conclusions of Law

1. Congress' intent in providing mutual compensation under the Act was to ensure that carriers that historically had not been compensated for terminating calls originating on the local exchange carrier network henceforth be compensated.

2. Paying compensation to one-way paging companies for terminating traffic is consistent with the Telecommunications Act of 1996, as well as FCC orders and regulations implementing the Act.

3. Cook's arguments did not convince us to adopt the termination rates negotiated by Pacific Bell and Pac-West Telecom nor those established in arbitrations between Pacific and wireline CLCs as reasonable approximations of Cook's additional costs of termination.

4. Pacific's cost estimate of 0.088 cents per page should be adopted as the rate for compensation to Cook for local termination on an interim basis.

5. Pacific's refusal to pay compensation on Type 1 connections is unreasonable because Cook still incurs termination costs at its paging terminal.

6. Pacific shall pay the same compensation to Cook for local termination regardless of whether the parties are interconnected by a Type 1 or Type 2A connection.

7. Cook should only be entitled to compensation for its paging terminal costs which, for the purposes of this arbitration, should be considered an equivalent facility to an end office switch.

8. Based on the facts in this arbitration, Cook is not currently entitled to compensation for transport. However, if and when Cook owns facilities that connect from a Pacific Bell end office or tandem to a Cook Paging Terminal, then Cook will be entitled to compensation for transport.

9. The Interconnection Agreement between Cook Telecom, Inc. and Pacific Bell should be rejected because it is inconsistent with the Act.

10. A new agreement should be submitted that conforms with this decision.

11. This order should be effective today.

O R D E R

IT IS ORDERED that:

1. Pursuant to the Telecommunications Act of 1996, the "Conformed Interconnection Agreement Between Cook Telecom, Inc. And Pacific Bell (U 1001 C)," dated and filed April 28, 1997, is rejected.

2. The parties shall jointly file, within 10 days of the date of this order, the Interim Conformed Interconnection Agreement in the formats described in Ordering Paragraph 5 below. The parties shall base their agreement on the "dueling clause"

agreement (Exhibit 20) and make the following changes to that agreement:

a. The sections of the conformed agreement shall reflect our determination that Cook is entitled to reciprocal compensation.

b. Section 3.2 of the agreement shall reflect our determination that Cook Telecom, Inc. is not entitled to the terms of the Pac-West agreement.

c. The termination compensation rate in the pricing Schedule in Attachment III shall be as follows:

0.088 cents per Local Paging Call

3. The agreement as described in Ordering Paragraph 2 above shall become effective when filed.

4. The assigned arbitrator shall issue a Ruling to establish a procedural schedule for the establishment of final rates for local transport and termination.

5. The parties shall submit the Interim Conformed Interconection Agreement to the Commission's Administrative Law Judge Division on electronic disk in hypertext markup language format. Further, within 10 days of the date of this order, Pacific Bell shall enter the Conformed Interconnection Agreement in its world wide web server, and provide information to the Administrative Law Judge Division Computer Coordinator on linking the Conformed Interconnection Agreement on Pacific Bell's server with the Commission's web site.

6. This proceeding shall remain open to set final rates for local transport and termination.

This order is effective today.

Dated May 21, 1997, at Sacramento, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
RICHARD A. BILAS
Commissioners

I dissent.

/s/ JOSIAH L. NEEPER
Commissioner

1997 Minn. PUC LEXIS 118 printed in FULL format.

In the Matter of the Petition of AT&T Wireless Services, Inc. for Arbitration of an Interconnection Agreement with U S WEST Communications, Inc., Pursuant to 47 U.S.C. § 252(b)

DOCKET NO. P-421/EM-97-371

Minnesota Public Utilities Commission

1997 Minn. PUC LEXIS 118

July 30, 1997

PANEL:
[*1] Edward A. Garvey, Chair; Joel Jacobs, Commissioner; Marshall Johnson, Commissioner; Don Storm, Commissioner

OPINION:
ORDER RESOLVING ARBITRATION ISSUES

PROCEDURAL HISTORY

On October 3, 1996, AT&T Wireless Services, Inc. (AWS) served U S WEST Communications, Inc. (USWC) with a request to negotiate under the Telecommunications Act of 1996, 47 U.S.C. § 251. The parties failed to reach an agreement on the issues subject to negotiation.

On March 7, 1997, AWS petitioned the Commission for arbitration of all unresolved issues pursuant to the Act.

On April 17, 1997, the Commission issued its ORDER GRANTING PETITION, ESTABLISHING PROCEDURES FOR ARBITRATION. This Order referred the arbitration between AWS and USWC to the Office of Administrative Hearings (OAH) for a contested case hearing before an Administrative Law Judge (ALJ). The Commission's Order limited party intervention in the proceeding to the Minnesota Department of Public Service (the Department) and the Residential and Small Business Utilities Division of the Office of the Attorney General (RUD-OAG) OAG/RUD. The Department and the RUD/OAG subsequently intervened in the proceeding.

The arbitration hearing began on May 6, 1997 [*2] and continued on May 7, 1997. The arbitration record closed on May 23, 1997, when reply briefs were received.

On June 6, 1997, the ALJ issued the Arbitration Decision in this matter. AWS and USWC filed exceptions on June 11, 1997.

On June 30, 1997, the Commission heard oral argument by the parties and on July 2, 1997, the Commission met to consider this matter.

FINDINGS AND CONCLUSIONS

I. Preliminary Matters

A. Administrative Notice

Minn. Stat. § 14.60, subd. 4 provides:

Agencies may take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within their specialized knowledge. Parties shall be notified in writing either before or during hearing, or by reference in preliminary reports or otherwise, or by oral statement in the record, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. Agencies may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence in the hearing record.

Pursuant to this statute, the Commission will take administrative notice of the stayed rules in Appendix B of the FCC [*3] order, as well as the related explanatory paragraphs in the First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98. The Commission has given notice at the hearing on this matter that it intends to do this and has given parties an opportunity to respond in oral argument. Certain portions of the order have already been made a part of the record of the arbitration.

As a result of its action in taking administrative notice of the items noted, the FCC methodologies have become part of the record in this matter and the Commission considers them as it would other evidence in the case.

B. Clarifying the Effect of the Stay

The Commission has no legal obligation to apply the methodologies, proxies or other directives contained in the stayed portions of the FCC's order. However, most of the FCC order has not been stayed and the Commission may not disregard these portions on the basis that it finds them illegal or unconstitutional.

The Commission, unlike a court, does not have the authority to declare a statute unconstitutional on its face. Neeland v. Clearwater Hospital, 257 N. W. 2d 366, 368 (Minn. [*4] 1977). Likewise, the Commission does not have the authority to declare a federal rule invalid. The federal courts of appeals have exclusive jurisdiction

. . .to enjoin, set aside, suspend (in whole or part) or to determine the validity of...all final orders of the Federal Communications Commission made reviewable by section 402 (a) of title 47.

28 U.S.C. § 2342 (1).

While the Commission has challenged the statutory authority of the FCC to regulate the pricing of intrastate telephone services, it has done so properly by intervening in a lawsuit before a federal court of appeals, not by declaring portions of the rule invalid.

C. Burden of Proof

In its April 17, 1997, *ORDER GRANTING PETITION, ESTABLISHING PROCEDURES FOR*

ARBITRATION in this matter, the Commission determined that USWC has the burden of proof in these proceedings. The Commission stated:

The burden of proof with respect to all issues of material fact shall be on U S WEST. The facts at issue must be proven by a preponderance of the evidence. The ALJ, however, may shift the burden of production as appropriate, based on which party has control of the critical information regarding the issue in dispute.
[*5]
The Commission's decision is consistent with the FCC's August 8, 1996 Order in CC Docket No. 96-98 in which the FCC specifically established a proof standard of clear and convincing evidence applicable to local exchange companies (LECs) who would deny an entrant's request for a method of achieving interconnection or access to unbundled elements.

The explicit placement of the burden of proof on U S WEST by the Commission and the FCC acknowledges that USWC and other LECs have a monopoly, not only over the local exchange network but also over information about the network that is needed to make major decisions in this proceeding.

D. Agreements Subject to Modification, Commission Approval

The agreements arbitrated in this proceeding may need to be modified in the future for several reasons. First, the parties may continue to negotiate as the states make their decisions. Second, some decisions may have to be made on an interim basis subject to later amendment in future proceedings. These future FCC and Commission decisions, including rulemakings, may need to be incorporated in these agreements. Indeed, the FCC Rules indicate that a party violates the duty under the Act to negotiate [*6] in good faith if it refuses

. . . to include in an arbitrated or negotiated agreement a provision that permits the agreement to be amended in the future to take into account changes in Commission or state rules.

47 CFR § 51.301 (c)(3).

Therefore, the Commission hereby clarifies that the agreements it approves in this Order are subject to modification by negotiation or by future Commission direction. Any future modifications or amendments should be brought to the Commission for approval.

E. Timeframe for Reconsideration and Final Contract Language

Minn. Rules, Part 7829.3000, subp. 1 establishes a 20 day timeframe for filing petitions for reconsideration. The Commission believes that a shorter timeframe is desirable in this case to act efficiently to promote the goals of the Federal Telecommunications Act. In considering whether a variance to allow parties to file a petition for rehearing or reconsideration within 10 days of the issuance of the Order is appropriate, the Commission notes that it may vary its rules pursuant to Minn. Rules, Part. 7829.3200 when:

. enforcement of the rule would impose an excessive burden upon the applicant or others affected by the [*7] rule;

. granting the variance would not adversely affect the public interest; and

. granting the variance would not conflict with standards imposed by law.

Applying these standards, the Commission finds that granting such a variance is warranted and will do so. First, varying the time frame for petitions for reconsideration from twenty days to ten will not impose an excessive burden upon the parties to this proceeding as it provides parties sufficient time to prepare their petitions and allows adequate time for the Commission to carefully and thoughtfully analyze the petitions for reconsideration. It will also allow the Commission to act efficiently to promote the goals of the Federal Act. Second, varying the time frame for the filing of petitions for reconsideration will not adversely affect the public interest, but instead will allow an orderly, efficient processing of this matter. Third, granting the variance would not conflict with standards imposed by law.

The Commission notes that it is not changing the 10 day time period allowed for answers to petitions for reconsideration. Minn. Rules, Part. 7829.3200, subp. 4.

Since the Commission desires to coordinate consideration [*8] of the final contract language with its review of the petitions for reconsideration, this Order will give the parties 30 days from the issuance of this Order to file final contract language. Interested parties and participants will have 10 days to file comments on the submitted final contract language.

II. Disputed Issues: Analysis and Action

A. Bill & Keep

Under 47 U.S.C. § 251(b)(5), each LEC has the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications. "Bill & Keep" is a compensation agreement where two interconnected carriers terminate each others traffic without billing each other. This method reduces the use of resources devoted to measuring traffic and billing.

1. AWS

AWS proposed that the companies be allowed to "bill & keep" in this case because, it argued, the amount of compensation to be exchanged between parties will be "equivalent". AWS explained that although the traffic between AWS and USWC is substantially unbalanced, AWS' higher costs to terminate traffic (more than 4 times USWC's cost) mean that in net, the dollar value of the compensation owed each other may be in balance.

AWS asserted [*9] that USWC has not presented any evidence regarding its own costs or AWS' costs, while AWS has provided evidence to indicate that its costs are substantially higher that the costs of USWC. AWS stated that it is prepared to waive full cost recovery to gain the advantages of "bill & keep".

2. USWC

USWC argued that the Commission should reject "bill & keep" as a compensation mechanism for transport, termination, and transit. USWC stated that the FCC concluded that bill & keep could be imposed by a state only if traffic is roughly balanced in two directions, is expected to remain so, and neither carrier has rebutted the presumption of symmetrical rates. USWC stated that traffic flows between it and AWS will rarely, if ever, reflect a stable pattern of balanced traffic because AWS will choose to serve particular types of customers and will target non-random groups, while USWC must serve all comers. USWC noted that in many of its existing agreements with CMRS providers the traffic is significantly unbalanced, e.g. land-to-mobile traffic is typically less than 25 percent of total traffic.

3. The Department

The Department recommended that "bill & keep" be rejected as a compensation [*10] mechanism for transport and termination. The Department rejected AWS' and USWC's cost studies as unreliable. The Department noted that AWS' evidence was extremely sketchy and USWC's cost studies were seriously flawed. Furthermore, the Department argued that the record is unclear as to what degree traffic between the parties is out of balance. Given the uncertainty regarding actual costs and actual traffic flows, the Department did not believe there is enough evidence to find that "bill & keep" will fully compensate both parties.

4. The ALJ

The ALJ did not explicitly address the issue of "bill & keep" but did make an explicit recommendation regarding the prices to be implemented in this proceeding. It appears that the ALJ's decision to recommend prices implies that it is not recommending "bill & keep".

5. Analysis and Action

Under 47 U.S.C. § 252(d)(2)(A) reciprocal compensation is not just and reasonable unless it

. . . provides for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and (ii) such terms and [*11] conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

Given the uncertainty regarding actual costs and actual traffic flows, the Commission does not believe there is enough evidence in this record to find "bill & keep" will compensate both parties. Therefore, the Commission finds that "bill & keep" is not an appropriate compensation mechanism for transport, termination, and transit.

B. Interim Prices

All parties and the ALJ agreed that permanent rates for exchange of traffic should not be set in this proceeding and should be set in the Commission's generic cost docket (P-442, 5321, 3167, 466, 421/CI-96-1540). At issue here is what interim rates will be established that will be subject to a true-up when permanent rates are set in the generic cost docket.

1. AWS

AWS sponsored proposed interim rates based on its modification of a USWC cost study, making adjustments to the cost of capital and depreciation rates. AWS proposed the following interim rates based on the cost study it submitted in this proceeding:

Type 2B (end office termination)	$ .0025	per minute of use
Type 2A (tandem switching and transport)	$ .0020	per minute of use
Transit (tandem switching and transport)	$ .0020	per minute of use

[*12]

2. USWC

USWC proposed two alternatives for interim prices:

1. The rates set in the March 1, 1994, agreement between the parties:

Type 2B (end office termination)	$ .0206	per minute of use
Type 2A (tandem switching and transport)	$ .0245	per minute of use
Transit (tandem switching and transport)	$ .0245	per minute of use

or

2. The interim rates set in the U S WEST Consolidated Arbitration docket:

Type 2B (end office termination)	$ .00260	per minute of use
Type 2A (tandem switching and transport)	$ .00556	per minute of use
Transit (tandem switching and transport)	$ .00556	per minute of use

3. The Department

The Department stated that neither party has submitted sufficient information to determine permanent rates for transport and termination. According to the Department, USWC has not supported the use of any cost study including the study it provided to AWS at AWS' request.

The Department noted that the cost study relied on by AWS on this subject is not based on TELRIC principles and was rejected in the Consolidated Arbitration. The Department further stated that AWS' modification of the USWC cost study is not sufficient to make that study [*13] appropriate.

The Department recommended that the Commission adopt the interim rates determined in the Consolidated Arbitration docket at this time and establish permanent rates with the guidance of the USWC's Generic Cost docket. The Department further recommended that the interim rates which would prevail at the conclusion of this proceeding, through to the conclusion of the Generic Cost docket, should be subject to true-up as was ordered in the Consolidated Arbitration.

4. The ALJ

The ALJ stated that it is appropriate to adopt as interim rates in this proceeding the interim rates for transport and termination ordered by the Commission in the Consolidated Arbitration Proceeding. The interim rates should prevail from the conclusion of this proceeding to the conclusion of the generic cost docket. The interim rates should be subject to true-up based on the permanent rates established in the Generic Cost proceeding.

5. Commission Action

Section 252(b)(4)(A) of the Act states:

The State commission shall limit its consideration of any petition under paragraph (1) [Arbitration.] ... to the issues set forth in the petition and in the response, if any, filed under paragraph [*14] (3).

Since the cost studies supporting the rates set in the USWC Consolidated Proceeding are not part of the record in this proceeding, they may not be relied on as the best evidence available. Those rates were based on Hatfield 2.2.2 which is not part of the record evidence.

The contract rates in the March 1994 contract between USWC and AWS were approved by the Commission in 1994. However, these rates were not cost-based and were approved under a different regulatory structure. As such, they are unsuitable for adoption as interim rates in this case.

As between USWC's cost study as is and its cost study as modified by AWS, the Commission finds that USWC's unmodified cost study is preferable because the Commission has approved the 13-year depreciation life used in that study. Hence, the Commission finds that the best evidence in the record is USWC's unmodified cost study.

The resulting rates are:

End Office Termination:	.001994
Tandem & Transport:	.001114
End Office Termination and Tandem & Transport:	.003108
Transit:	.001114

These rates do not include an amount of depreciation reserve deficiency (.00130), as originally requested by USWC. USWC subsequently withdrew [*15] its request to recover the depreciation reserve deficiency in the rates set in this Order, stating that the depreciation reserve deficiency should be established for all ILECS in a separate study. In these circumstances, the Commission finds that the absence of an amount of depreciation reserve deficiency in the rates established in this Order do not render such rates unreasonable. In so finding, the Commission is not determining that the rates ultimately adopted as a result of the generic cost proceeding will or will not contain an amount of depreciation reserve deficiency. The Commission notes, however, that depreciation reserve deficiencies have never been approved by this Commission.

C. Compensation to AWS From Third Party Carrier

The parties could not agree on what termination charges would be owed to AWS by third party carriers for calls originating with a third party carrier, transiting U S WEST's network, and terminating on AWS' network. Nor could the parties agree on USWC's role in facilitating the collection of these charges by AWS in the interim period when AWS has not developed agreements with third party carriers.

1. AWS

AWS argued that until it can arrange [*16] agreements with third party carriers, USWC should not bill or collect termination charges for carriers using its facilities for transited traffic unless those carriers have a reciprocal arrangement themselves. According to AWS, third party carriers and AWS should originate and terminate their own traffic, vis-a-vis each other, on a "bill & keep" basis.

2. USWC

USWC asserted that it is not responsible for the monetary arrangement between originating and terminating carriers. USWC argued that it is not required to negotiate transiting arrangements and to bill for them on behalf of AWS and that AWS' relationships with third party carriers have nothing to do with this proceeding between USWC and AWS.

3. The Department and the ALJ

Neither the Department nor the ALJ commented on this issue.

4. Commission Action

The Commission finds that it is consistent with the Act that USWC be required to make its recording and billing services available to AWS to facilitate AWS' collection of termination charges owed it by third party carriers. Of course, if AWS does use USWC's recording and billing services it must compensate USWC at a reasonable rate.

D. Compensation for Traffic [*17] Terminated at AWS' MSCs

The parties could not agree whether AWS should be compensated for its Mobile Switching Center (MSC) at the same rate USWC is compensated for its tandem switch or at the lower, end office rate.

1. AWS

AWS argued that it should be compensated at the higher tandem switch rate for use of its MSCs. AWS stated that its MSC can and does terminate calls to any physical location to which USWC's tandem can terminate calls and performs functions remarkably similar to a USWC tandem switch.

AWS referred to the Commission's decision in the Consolidated Arbitration where the Commission stated that competing local exchange company (CLEC) switches perform the same function as the incumbent's tandems in that they both route and carry the calls of the other carrier's subscribers. AWS argued that there is no demonstrable difference between a CLEC switch, AWS' MSC, and USWC's tandem.

2. USWC

U S WEST's position is that AWS' switched network does not perform a tandem switching function and, therefore, does not qualify for higher tandem switching rates. USWC argued that AWS' switch functions as an end office switch, that AWS provides only a single switching function, [*18] and that AWS does not incur the costs that USWC does in performing two switching functions.

USWC also rejected AWS' argument that USWC should pay tandem rates, as opposed to end office rates, simply because AWS claims to have higher costs. The key factor, according to USWC, is that AWS' MSC does not perform a tandem function, that even though AWS may employ an IS41 Tandem switch, that equipment is not used to perform a tandem switching function.

3. The Department

The Department supported the position taken by AWS, that AWS's MSCs should receive compensation at the tandem switch rate. Citing the FCC Order at Paragraph 1090, Department stated that state commissions are directed to consider the functionality and the geographic area to be served by a competitor's switch in comparison to the LEC's switch. The Department noted that AWS' MSC switches appear to function in both end office and tandem capacities, that AWS' cell site control switch and cell sites work together to perform end office functions. Additionally, the Department noted that AWS' MSCs perform transit functions by routing calls to other wireless carriers.

4. The ALJ

The ALJ noted that Paragraph 1090 of the [*19] FCC's First Order directs that states consider the functionality and geographic area to be served by a competitor's switch in comparison to the LEC's switch. The ALJ found that AWS' MSC switches appear to function in both end office and tandem capacities, that AWS' cell site control switch and cell sites work together to perform end office type functions, and that AWS' MSCs perform transit functions by routing calls to other wireless carriers to complete the roaming calls of its customers. The ALJ further noted that by virtue of the MSCs' technical capabilities and interconnections with other networks and AWS's roaming agreements with other wireless carriers, AWS subscribers can place and receive calls for out-[state] Minnesota. The ALJ concluded, therefore, that AWS' MSCs are comparable to USWC's tandem switches and, as such, warrant compensation at USWC's tandem rate for USWC traffic terminated at AWS's MSC.

The ALJ expressed surprise that several other State Commissions have determined that a wireless network does not qualify to be compensated at the tandem rate, in light of the quantum of proof imposed on a LEC on this type of issue and the Act's focus on competition and accommodation [*20] to new technologies. In any event, the ALJ noted, the Minnesota Commission addressed this issue as it relates to Minnesota competing local exchange carriers who do not have wireless networks in the Consolidated Arbitration Proceeding Order. See Order, pages 70-72. In that Order, the Commission stated that it was inappropriate to focus on "certain technical and functional differences between U S WEST's tandems and typical CLEC switches". The ALJ stated he was unpersuaded that the technical differences between AWS's MSC warrants treating AWS's MSC like a USWC end office and concluded that USWC failed to prove that the difference justifies different